

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

75-6120

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



ALBERT M. BILLITERI,

Appellee,

v.

UNITED STATES BOARD OF PAROLE and MEMBERS
OF THE UNITED STATES BOARD OF PAROLE,
Individually and in Their Official Capacity,
and UNITED STATES OF AMERICA,

Appellants.

APPELLEE'S PETITION FOR REHEARING
OR FOR REHEARING IN BANC

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The judgment of the Court was entered August 30, 1976. Appellee's motion for an extension of time for filing a petition for rehearing or rehearing en banc until September 20, 1976 was filed with the Court September 13, 1976, and has not, at this writing, been acted upon.

Appellee petitions for rehearing, or in the alternative for rehearing en banc, for the following reasons:

The Court, in its opinion of reversal herein, has overlooked or misapprehended the requirements of due process as they have been applied to Parole Board proceedings, and has ruled in conflict with prior decisions of this Court in two areas:

First, in holding that Billiteri had no right to view and respond

to the documentary evidence before the Parole Board and relied upon by it, the Court's holding is contrary to a previously unbroken line of cases in which this Court has required that basic due process safeguards be observed by parole boards. Johnson v. Chairman, New York State Board of Parole, 500 F.2d 540 (1975); Cardaropoli v. Norton, 523 F.2d 990 (1975); Haymes v. Regan, 525 F.2d 540 (1975); U.S. ex rel Carson v. Taylor, Slip Op. 5075 (July 22, 1976); Shepard v. United States Board of Parole, Slip Op. 5413 (September 7, 1976). See also Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

Second, in holding that, because the relief sought was release from custody (which is properly sought in habeas corpus) jurisdiction does not exist under 28 U.S.C. § 1361 and 5 U.S.C. § 701 et seq., the Court holds contrary to the Court's recent decisions in Schoenbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968), and Lovallo v. Froehlke, 468 F.2d 340 (2d Cir. 1972).

In addition, as will be more fully discussed below, we believe the Court has based its reversal herein on at least one significant error of fact.

The questions presented by this case are of considerable importance, and call for authoritative decision by this Court. The issues concerning the adequacy of the Parole Board's procedures are of overwhelming importance to large numbers of Federal and state prisoners, who have come to this Court and the district courts in this circuit in increasing numbers over the past three years. An authoritative decision of the Court in banc, by settling certain of these recurrent questions, might stem or at least slow, this flood of litigation. Allowing the conflicts between

panels of this Court to remain, appellee submits, would only encourage further litigation of these questions. Secondly, the issue of jurisdiction herein is of considerable importance to the administration of justice, as the effect of the Court's decision is to concentrate Federal Parole Board litigation in the few districts where Federal correctional institutions are located, rather than spreading it uniformly across this country. See Appellee's Brief, pp. 31-32.

POINT I

DUE PROCESS REQUIRES THAT PAROLE APPLICANTS
BE GIVEN A CHANCE TO RESPOND TO THE EVIDENCE
ON WHICH THEIR PAROLE APPLICATIONS ARE DENIED.

Appellee submits that the Parole Board's refusal to allow Billiteri and his counsel to view the presentence report, the Petersen memorandum (App. 436-37, and Brief, p. 13), and the hearing panel report and other documents relied upon by the Board in its December 11, 1974 and January 13, 1975 decisions, is a clear violation of due process. Judge Curtin held that Billiteri's inability to view and respond to these documents -- some of which were unknown to Billiteri until after Billiteri II, see Appellee's Brief, p. 13n -- was improper, but this Court, at Slip Op. 5295-96, rejects this claim, and holds that a parole applicant has no right even to know of the existence of such information.

In short, the Court has held that the Parole Board may rely on any written information in its file, secretly and without disclosure of that evidence to parole applicant for questioning or refutation.

This holding is contrary to the most fundamental requirement

of due process, that one whom the Government would deprive of liberty have the opportunity to hear and be heard on the evidence offered against him.

The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. at 171-172. Matthews v. Eldridge, U.S. , 44 U.S.L.W. 4224, 4233 (February 24, 1976).

See also Cardaropoli v. Norton, supra., 523 F.2d at 996; Morrissey v. Brewer, supra., 408 U.S. at 489 (due process requires disclosure to parolee of evidence against him at parole revocation hearing).

This Court recently dealt with a case involving insufficient disclosure by the Parole Board of evidence against a purported parole violator in United States ex rel. Carson v. Tavior, Slip Op. 5075 (July 22, 1976). There, the Court held that nondisclosure of documentary evidence against Carson violated due process. The Court held that

A parolee must be afforded the opportunity for effective rebuttal of allegations against him. Although a formal hearing and formalized cross examination are not necessary, the Supreme Court recognized in Morrissey that no one's interest -- neither the public's nor the parolee's -- is fostered by exposing a parolee to a substantial risk of recommitment upon the basis of erroneous impressions or conclusions gathered upon innuendo or exaggeration, as distinguished from "verified facts." Slip. Op. at 5084.

The opinion herein, in denying Billiteri the opportunity to attempt to rebut the statements against him is squarely in conflict with the well founded constitutional doctrine followed by the Carson panel.

The panel's decision is also in conflict with a case decided

since the filing of the opinion herein. In Shepard v. United States Board of Parole, Slip. Op. 5413 (September 7, 1976), the Court held that the failure of the Parole Board, before the hearing, to disclose "in unabridged form all the evidence which may be submitted against him," denied a prisoner due process. Slip Op. at 5425. The Court specifically held that this disclosure was required in advance, "soon enough to allow the parolee a meaningful opportunity to contest, mitigate or explain the evidence revealed." Id. at 5425.* This ruling, which Appellee submits is correct, is in sharp contrast with the panel's holding herein, that such evidence need not be shown to prisoner, and its alternate holding that it was sufficient for Billiteri to have the opportunity to view and rebut this evidence at a later time (at the in court hearing held unauthorized at p. 5293).

The Court cites only Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975), in support of its rejection of Billiteri's demand for "a kind of discovery and disclosure," pp. 5295, 5296. But Haymes stands only for the proposition that no disclosure of a statement of the Board's release criteria is required by due process, and does not consider the question of disclosure of evidence. The citation, at the end of this paragraph and elsewhere in the opinion, of Brown v. Lundgren, 528 F.2d 1050 (5th Cir. 1976), is startling, as the Fifth Circuit in Brown is

*Although Shepard challenged a parole violation detainer filed against him while he was a state prisoner, rather than a denial of parole for the affixing of an "oj/oc" label, the distinction is legally insignificant: The effect of the Parole Board's action in deciding wrongly in any of these situations is to extend the time of incarceration and to impose other restrictions and disabilities upon him. Compare Shepard, Slip. Op. 5419-22 with Cardaropoli, 523 F.2d 993-995, and Johnson, 500 F.2d 927-929.

the one Court of Appeals squarely to rule, in a reported decision, that due process does not apply to parole release decisions, contrary to this Court's decisions in Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925; Cardaropoli v. Norton, 523 F.2d 990 (1975), and Haymes v. Regan, supra., and contrary to the Fourth, Seventh and District of Columbia Circuits: Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974); U.S. ex rel Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975); Childs v. United States Board of Parole, 511 F.2d 1270 (D.C. Cir. 1974). (The Sixth Circuit, in Scott v. Kentucky Board of Parole (unreported), cert. granted 44 U.S.L.W. 3358 (December 15, 1975), has also ruled contrary to the Court's decision in Johnson, supra.

POINT II

THE EXISTENCE OF HABEAS CORPUS JURISDICTION DOES NOT BLOT OUT MANDAMUS OR APA JURISDICTION

The Court held that habeas corpus relief in the district of confinement was the sole remedy for Billiteri; and that habeas corpus was not available to him in the Western District of New York (Slip Op. at 5301-3). Each of these two conclusions is, appellee submits, erroneous, and in conflict with other decisions in this circuit.

In Schoenbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968), where a military reservist challenged an order directing him to report for active duty, the court held that the potential availability of habeas corpus elsewhere did not prevent the district court from proceeding in mandamus:

Whether or not habeas corpus is available, the District Court was free to treat the petition as one for mandamus under 28 U.S.C. §1361. 403 F.2d at 374.

The Court's holding was reaffirmed in Lovallo v. Froehlke, 468 F.2d 340, 343-44 (2d. Cir. 1972):

The first argument made by the Army is that appellant has sought the wrong remedy because the remedy of habeas corpus is available. It asserts that he should have reported to the Army at Fort Dix and then brought a petition for a writ of habeas corpus in New Jersey. We do not see the necessity for that involved method in a case like this.

The Court held that the petition could properly be treated as one for mandamus.

Although these cases are cited in Appellee's brief (pp. 23-24), the panel's decision overlooks them on this point. The only authority cited for the panel's conclusion that the availability of habeas corpus relief precludes other bases for jurisdiction is Preiser v. Rodriguez, 411 US 475 (1973). But Preiser is a case that turns entirely on the issues of federalism and comity between Federal and state governments, as expressed in 28 U.S.C. §2254. See 411 U.S. at 477, 482-83, 489-93, 500.*

Appellee submits that Judge Friendly properly characterized Preiser in his concurrence in Kahane v. Carlson, 527 F.2d 492, 498 (2d Cir. 1975), as a case holding

only that a state prisoner who was seeking to challenge the length of confinement could not utilize 42 USC §1983 and its jurisdictional counterpart, 28 USC §1343(3), to avoid the exhaustion requirements of §2254(b) and (c).

But here, where Billiteri is in Federal prison and challenges the actions of his Federal custodians, §2254 does not apply, and no issues of federalism or comity are present. Preiser v. Rodriguez is inapposite, and no authority whatever for the panel's sub silentio overruling of Schoenbrun and Lovallo.

*Preiser turns, in substantial part, on reading the enactment of §2254 in 1948 as a limitation on §1983 (enacted in 1871). There is no reasonable argument that Congress intended this interpretation to apply to 28 U.S.C. §1361, enacted in 1962.

Appellee submits that the Court should follow, rather than overrule, Schoenbrun and Lovallo, and reaffirm that the availability of habeas corpus in a distant district does not preclude a federal court from exercising jurisdiction under other statutory bases. This court must therefore reach and deal with the question whether jurisdiction is available under 28 U.S.C. §1361 or 5 U.S.C. §701 et seq.

The panel concedes, at page 5299, that (at least if habeas corpus is not the sole available remedy), that the allegations in the complaint that the Board had denied Billiteri due process, if proven, would support jurisdiction under §1361. Appellee submits that, as argued above, Part I, the failure of the Board to afford Billiteri due process is sufficient to support §1361 jurisdiction.

The Panel held, at p. 5300, that mandamus did not lie to challenge the "oj/oc" designation in this case, because the proper defendant was the Bureau of Prisons and not the Parole Board: "It is not the Parole Board which originates or makes this designation but the Bureau of Prisons." This holding is based on a factual error:

The Board's regulations, 28 C.F.R. §2.17(b) state:

The following criteria will be used in designating cases for the original jurisdiction of the Regional Directors:

...
2. Organized Crime. Persons who the Regional Director has reason to believe may have been professional criminals or may have played a significant role in an organized criminal activity. (emphasis added)

The first notice given to Billiteri that he was classified oj/oc, after the oral notice at the December 11, 1974 hearing, was on a Board of Parole

form (App. 126). It is important to note that the affidavit of the Board's Regional Director (App. 119-23) which accompanied the notice, admits that Billiteri had in February 1974 been classified "oj/oc" by the Regional Director (app. 119-120) -- in conflict with the Respondent's original denial in this lawsuit that Billiteri was so classified. See appellee's Brief, p. 20n. Thus not only did Billiteri have no notice that he was so classified, Respondents had denied such a classification. Appellee submits that, under Cardaropoli, supra, the "oj/oc" label was affixed to Billiteri in violation of his due process rights, as Judge Curtin found, and that mandamus under Section 1361 was a proper vehicle for litigating the matter.

Even if the "oj/oc" label were affixed by an entity other than the Board of Parole, relief would be available against the Board. First, "oj/oc" cases, such as Billiteri, are burdened with a particular disadvantage before the Parole Board. Simply by reason of the labeling of the prisoner as "oc" -- which label the Board concedes may be based on unsupported allegation, see Appellee's Brief, pp. 12-13, App. 122 -- the case would be referred for an original jurisdiction hearing, as was done here. This referral necessarily delays the parole release decision, as it did here for five weeks. More significantly, the "oj/oc" designation under 28 C.F.R. §2.17 introduces an invidious distinction that operates to the disadvantage of prisoners so tagged. Under Sections 2.12 and 2.13, Billiteri was permitted counsel at the December 11, 1974 initial hearing. But this panel, because of the "oj/oc" label, did not make the decision but only served as "the investigative body which made up the hearing summary and forwarded it together with the case record to the five Regional Directors who made the decision to grant or deny parole." Slip. Op. at

5297. Section 2.17 makes no provision for appearances by the prisoner or his counsel before the Regional Directors who make the decision, and Billiteri and his counsel were specifically refused permission to attend. Appellee's Brief, p. 35, App. 91. Prisoners like Billiteri who are designated as "oj" cases then, have no access to the deciding body, but other prisoners have such access. Judge Curtin found that this treatment -- which was the action of the Parole Board, by whomever prompted -- was arbitrary and capricious and denied Billiteri due process. 391 F.Supp. 263-64:

The opportunity thus far accorded Billiteri to contest [the allegations of organized crime involvement and concerning offense severity] was defective. On December 11, 1974, he was surprised, and on January 13, 1975, when it counted, he was precluded. Id.

Appellee submits that this treatment also denied Billiteri equal protection, and that the interests cited by the Crawford affidavit (App. 119-123) do not justify the different treatment. In any event, it is clear that here the "oc" label placed on Billiteri without notice and hearing, was placed there in violation of law. Cardaropoli, supra. As the wrong complained of flows from that unlawful labeling, the denial of access to the deciding body would not be justified in this case, even if it were justified in the ordinary case.

The wrong done here to Billiteri by the "oc" designation is one that arises from the operation of the Parole Board's regulations, and is done to him by the Parole Board, even if that action is done on the basis of another body's flagging of Billiteri's file. As the action here was brought not to remove the "oc" classification, but to remedy the consequent wrong done by the Parole Board, the Board was a proper defendant under §1361.

The Court also erred, Appellee submits, in holding that habeas corpus was not available in the Western District of New York, pp. 5202-03. At the core of the Court's holding is the insistence that the Board of Parole was not Billiteri's "custodian" within the meaning of the habeas corpus statute, and that only the Warden of Lewisburg Federal Penitentiary is a proper custodian. This holding will not bear analysis.

All that is necessary for habeas corpus jurisdiction is that there be "a respondent within reach of [the Court's] process who has custody of the petitioner." Ex Parte Endo, 323 U.S. 283, 306. The Parole Board is clearly within the reach of the court's process, both by presence and by consent, see Appellee's Brief, pp. 27-31. Appellee submits that the Board must be held to be a proper "custodian," if the writ is to serve its proper and historic function. The Court properly recognizes that the Parole Board has "the sole power to grant or to deny parole. 18 U.S.C. §4203," at 5293. The meaning of "custodian" within 28 U.S.C. §2241 has never been limited to the immediate jailer of the petitioner, but rather includes anyone with the power to order the prisoner's release. In Ex Parte Endo, supra, the Petitioner was confined outside the district, but within the district was an associate director of the Federal agency under whose authority the petitioner was held. In those circumstances, the Court held that the absence of the petitioner (and of her immediate jailer), did not defeat habeas corpus jurisdiction, where (as was true for Billiteri herein) the Court's order would be effective to secure her release. 283 U.S. at 304-5. To the same effect are numerous opinions which find or assume habeas

corpus jurisdiction where the petitioner's immediate custodian is outside the district, but "one in the chain of command" is within reach of the court's process, Schlanger v. Seamans, 401 U.S. 487, 489 (1971). See Strait v. Laird, 406 U.S. 341 (1972); Burns v. Wilson, 346 U.S. 137 (1953) (Respondent, Secretary of Defense); Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949), rev'd on other grounds, sub. nom. Johnson v. Eisentrager, 339 U.S. 769 (1950). Appellee submits that, on the basis of the above decisions, the power to grant or deny release as possessed by the Parole Board, is sufficient under 28 U.S.C. §2241 to make the Board the proper custodian.*

This Court's opinion herein, at p. 5303, recognized that the Parole Board's discretion to imprison or not can, in certain circumstances, make it a "custodian" where a prisoner has been released into the supervision of the Board's agents, or where the Parole Board has caused a parolee to be detained. But somehow, where the Board is equally the body that determines the freedom or confinement of the individual, in the parole release decision making process, it is not the "custodian," in the Court's opinion. Appellee submits that the artificiality of the Court's distinction herein points to the unsoundness of its conclusion, and that the Parole Board, because of its exclusive power to grant or deny relief to a prisoner, is a "custodian" within the meaning of the habeas corpus statute. As the Harvard Law Review editors sensibly put it:

*Another panel of this Court, in Shepard v. United States Board of Parole, Slip. Op. 5413 (September 7, 1976), a habeas corpus case in which the only named respondent is the Board of Parole, assumed, in conflict with the decision herein, that the Board is a proper habeas respondent.

So long as the petitioner names as respondent a person or entity with power to release him, there is no reason to avoid reaching the merits of his petition. If he is confined by state judicial process or executive action in the state or federal government, he should be permitted to name as respondent either the government or the official holding him in custody. Developments in the Law - Federal Habeas Corpus, 83 Harvard Law Review, 1038, 1168 (1970).

POINT III

JUDGE CURTIN'S DECISION AND CHOICE OF REMEDY WERE PROPER.

Whether or not Judge Curtin ruled correctly on the offense severity issue, the failure of the Board to afford Billiteri due process at his second hearing December 11, 1974 is a sufficient basis for the order discharging Billiteri from custody.

If a hearing in Court was improper, as the Court ruled and Appellee conceded (Appellee's Brief, p. 31), the question remains, what was the District Court to do after the first remand to the Parole Board. As we argued at pp. 38-42 of Appellee's Brief, we submit that the Court upon finding (properly, as we argue above) that the second hearing on remand had violated due process and was "in many respects worse than before," App. 147, 391 F.Supp. at 262, Judge Curtin had three alternatives: 1) to order yet another remand; 2) to order Billiteri released; or 3) to hold a hearing in open court on the disputed issues. The third, which the Court chose, was a more cautious alternative than outright discharge, but was beyond the authority of the Court, leaving only the first two alternatives. But the Court also found that the Parole Board was

"undeserving" of another chance, and that another remand would be "unfair to the plaintiff," in view of the Board's previous handling of the matter. See Appellee's Brief, pp. 40-41. Appellee submits that this finding was proper and within the Court's discretion, see Shepard v. United States Board of Parole, supra., Slip. Op. at 5427-28, and thus left the Court only with the alternative of ordering Billiteri released. Appellee submits, in short, that he should have been ordered discharged in Billiteri II rather than Billiteri III.

Further, the findings, together with the finding that the Board had not complied with the Court's order of remand, provides another basis for affirmance of Judge Curtin's order. In Grasso vs. Norton, 520 F.2d 27, this Court affirmed Judge Newman's order releasing the prisoner, based only on the Court's finding that the Board wrongfully disobeyed the Court's previous order, under circumstances very similar to those in this case.* (see Appellee's Brief, pp. 38-39). Judge Curtin similarly found the Board not in compliance with his prior order, and that finding, like the District Court's in Grasso, should be held to be sufficient basis for the Court's order releasing Billiteri, even though that order was delayed until after the unauthorized courtroom hearing.

WHEREFORE, for the foregoing reasons, and because this distinguished Court should not sanction the lawless action of the Parole Board

*Although Grasso concerned a habeas corpus petitioner, the Court's citation of Walker v. Birmingham, 388 U.S. 307 (1967), a case concerning a civil injunction, makes clear that the Grasso's applicability is not limited to habeas corpus cases.

in this case, it is respectfully urged that this petition for rehearing or in the alternative, for rehearing in banc, be granted and that the judgment of the District Court be, upon further consideration, affirmed.

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Respectfully submitted,

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